Supreme Court, U.S.
FILED
MAY 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1371

In the Supreme Court of the United States

OCTOBER TERM, 1986

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND MEDIA ACCESS PROJECT, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DIANE S. KILLORY
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the Federal Communications Commission exceeded its authority under the Communications Act of 1934 by holding that broadcast licensees' teletext services are not subject to the requirements of the fairness doctrine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Columbia Broadcasting System Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 3

Commercial TV Stations, 98 F.C.C.2d 1076 (1984), petition for review pending *sub nom. Action for Children's Television* v. *FCC*, No. 86-1425 (D.C. Cir. filed July 25, 1986) 14

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 9

Fairness Doctrine Report, 102 F.C.C.2d 143 (1985), petition for review pending *sub nom. Radio-Television News Directors Ass'n* v. *FCC*, No. 85-1691 (D.C. Cir. filed Oct. 22, 1985) 8, 11, 14

Lar Daly, 26 F.C.C. 715 (1959) 11

Meredith Corp. v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987) ... 14

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 9

Public Interest Research Group v. *FCC*, 522 F.2d 1060 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976) 8, 10

Radio Deregulation, 84 F.C.C.2d 968, on reconsideration, 87 F.C.C.2d 797 (1981), aff'd in relevant part, *Office of Communication* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) 13

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 3, 9, 12

Constitution, statutes and regulation:

U.S. Const. Amend. I 12, 15

Federal Communications Act of 1934, 47 U.S.C. 151 *et seq.*:

47 U.S.C. 151 4

47 U.S.C. 303(g) 4

Statutes and regulation – Continued: Page

47 U.S.C. 312(a)(7) 5, 7
47 U.S.C. 315 5
47 U.S.C. 315(a) 5, 9
47 C.F.R. 73.1910 3

Miscellaneous:

133 Cong. Rec. S5218-S5232 (daily ed. Apr. 21, 1987) ... 15
133 Cong. Rec. D634 (daily ed. May 7, 1987) 15
H.R. 1934, 100th Cong., 1st Sess. (1987) 15
S. Rep. 562, 86th Cong., 1st Sess. (1959) 12
Syracuse Peace Council, 52 Fed. Reg. 2805 (1987) 15

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1371

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND MEDIA ACCESS PROJECT, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 801 F.2d 501. The order denying the petition for rehearing (Pet. App. 135a) is not reported. The order denying the suggestion for rehearing en banc (Pet. App. 137a-151a) is reported at 806 F.2d 1115. The orders of the Federal Communications Commission (Pet. App. 39a-134a) are reported at 48 Fed. Reg. 27054 (1983) (Report and Order) and 101 F.C.C.2d 827 (Order on Reconsideration).

JURISDICTION

The judgment of the court of appeals (Pet. App. 152a) was entered on September 19, 1986. A petition for rehearing was denied on December 16, 1986 (Pet. App. 135a). The petition for a writ of certiorari was filed on February 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As a result of recent technological advances, television broadcasters are now able to transmit text and graphic material in a previously unused portion of an ordinary television broadcast signal.[1] This textual transmission, which has come to be known as "teletext," can be received by television sets equipped with appropriate decoding equipment. Examples of potential teletext transmission services include news, weather reports, comparative shopping prices, and entertainment schedules. Pet. App. 3a-4a, 39a-40a & n.2; see also *id.* at 60a (footnote omitted) (defining a teletext service as "a data system for the transmission of textual and graphic information intended for display on viewing screens" and the transmission of "data that is useful to widen and enhance the utility and service of teletext information [such as codes that relate to the method by which information is displayed on viewing screens], even though this latter data is not necessarily intended for display").

In the fall of 1981, the Federal Communications Commission issued a notice of proposed rulemaking seeking comments addressing the terms upon which television broadcasters should be permitted to provide teletext services. After considering the comments filed by interested members of the public, the Commission adopted rules "authoriz[ing] licensees of both full service and low power television stations: (1) to operate teletext services and (2) to choose both the kinds of service to offer and the technical systems for transmitting the data signals" (Pet.

---

[1] This material is transmitted in the vertical blanking interval of the video portion of the television signal. (The vertical blanking interval is that portion of the television signal that appears as a black bar when the picture rolls.) Pet. App. 39a & n.1. Thus, a television broadcaster may transmit both regular programming and textual material on a single signal.

App. 58a-59a (footnote omitted)). The Commission adopted an "open regulatory approach," declining to prescribe the method broadcasters should utilize in operating teletext services, because of the wide variety of potential uses of teletext, the likelihood that user demand will require different types of services, and the probability that the pattern of demand will shift over time (*id.* at 62a-64a).

The Commission concluded that "the Fairness Doctrine should not be applied to teletext services" (Pet. App. 69a).[2] The Commission observed that Congress in 1959 "added language [to the Communications Act of 1934] recognizing the Commission's Fairness Doctrine policy" (Pet. App. 67a (footnote omitted)). The Commission stated, however, that "Congress' purpose in adding this language was solely to ratify the Commission's then-existing policy concerning application of the Fairness Doctrine to news broadcasts"; in the Commission's view, "Congress did not require nor prohibit possible extensions of that policy in the future" (*id.* at 67a-68a). Thus, "any determination concerning this question is one which has been entrusted to [the Commission's] sound judgment and discretion in the first instance" (*id.* at 68a).[3]

---

[2] The fairness doctrine provides that "broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (47 C.F.R. 73.1910). It thus imposes two separate obligations upon a broadcast licensee: the licensee must (1) provide coverage of controversial issues of public importance in the communities that it serves, and (2) provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110-111 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 377-378 (1969).

[3] The Commission further noted that even if the 1959 amendment did "incorporate the Fairness Doctrine as a statutory requirement," the Commission retained discretion to determine whether the doctrine

The Commission found that application of the fairness doctrine in the teletext context was inappropriate for several reasons. It first observed that "it seems probable that teletext—a textual means of communication primarily not employing sound and pictures—more closely resembles, and will largely compete with, other print communication media such as newspapers and magazines" (Pet. App. 69a). "In this arena of competition, which includes all other sources of print material to which the public has access," the Commission was "not persuaded that [teletext] must be accorded special First Amendment treatment in order to protect the public's right of access to conflicting views on issues of public importance." *Ibid.*; see also *id.* at 118a (order on reconsideration).

The Commission also stated that its determination was justified by the policy favoring the development of new communications services (see 47 U.S.C. 151, 303(g)). It noted that teletext could be used "to provide an alternative method for the delivery of newspapers and other print media to consumers," but that "many commenters [had] questioned whether such services would ever be economically viable if licensees are burdened with Fairness Doctrine obligations" (Pet. App. 70a). Finding that "the likelihood of licensees' embarking upon these types of endeavors will be substantially affected" by the decision whether to apply the Fairness Doctrine, the Commission declined to "block from the outset full development of this promising new service by the unreflective application of requirements that appear fundamentally unsuitable and which are not legally required" (*ibid.*). It noted that "[s]uch a course would be inconsistent with [its] statutory responsibility to promulgate policies that are responsive to

---

should apply to teletext services because "regardless of how Congress' action is characterized, it seems clear that novel services such as teletext were beyond its scope" (Pet. App. 68a n.24).

the characteristics of new communications services so as to encourage, not frustrate, their development" (*ibid.*). For that reason, the Commission concluded that "the public interest is better served by not subjecting teletext to Fairness Doctrine obligations" (*ibid.*).[4]

2. The court of appeals affirmed the Commission's decision in pertinent part by a divided vote, holding that the Commission did not exceed its authority by declining to apply the fairness doctrine to teletext services (Pet. App. 1a-38a). The court first rejected petitioners' argument that the 1959 amendment to the Communications Act codified the fairness doctrine, thereby eliminating the Commission's discretion to determine whether the application of the doctrine in a particular context is consistent with the public interest. The court held that the amendment simply "ratified the Commission's longstanding position that the public interest standard authorizes the fairness doctrine. The language, by its plain import, neither creates nor imposes any obligation, but seeks to make it clear that the statutory amendment does not affect the fairness doctrine obligation as the Commission had

---

[4] The Commission also determined that the statutory requirement that licensees "allow reasonable access * * * for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy" (47 U.S.C. 312(a)(7)) could be satisfied by providing access to conventional broadcast operations; the Commission stated that Section 312(a)(7) does not require licensees in addition to afford candidates access to teletext services (Pet. App. 65a-66a). Finally, the Commission discussed the application in the teletext context of Section 315 of the Communications Act, which provides that when a licensee permits one candidate for public office to use a broadcasting station he must afford "equal opportunities" to all other candidates for that office (47 U.S.C. 315(a)). It stated that "because of the fundamental dissimilarity between teletext and the types of broadcast 'uses' envisioned by Congress in Section 315, * * * the equal opportunities requirement need not be applied to teletext services" (Pet. App. 67a).

previously applied it" (Pet. App. 34a). The court stated that "the obligation recognized and preserved [by the 1959 amendment] was an administrative construction, not a binding statutory directive"; it found that the language of the amendment suggested "that Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act" (*id.* at 35a).

Although the Commission for the foregoing reasons was not bound "to adhere to a view of the fairness doctrine that covers teletext," the court stated that, to the extent the Commission's decision amounted to "a change in its view of what the public interest requires * * *, the Commission has an obligation to acknowledge and justify that change in order to satisfy the demands of reasoned decisionmaking" (Pet. App. 35a). The court found that the Commission acted rationally in concluding that application of the fairness doctrine was inappropriate because "the burdens of applying the fairness doctrine might well impede the development of the new technology" (*id.* at 36a). The court observed that "[i]n effect, the Commission posited an absence of fairness doctrine burdens and made predictions about the marginal encouragement to the development of teletext and the marginal diminution, if any, in the presentation of opposing viewpoints on controversial matters of public importance. In weighing the public interest implications of the two marginal effects, the Commission concluded that the balance favored forbearance from applying the fairness doctrine" (*id.* at 36a-37a). Because there was no evidence that the Commission's conclusion was arbitrary and capricious, the court of appeals affirmed the Commission's determination.[5]

---

[5] The court also upheld the Commission's determination that the "reasonable access" requirement imposed by Section 312(a)(7) of the Act does not separately apply to teletext services (Pet. App. 18a-25a). It reversed and remanded the Commission's action insofar as the

ARGUMENT

Viewed in the abstract, the question whether Congress has mandated the imposition of the fairness doctrine with respect to all broadcast services, and thereby deprived the Federal Communications Commission of its discretion to determine if the public interest would be served by applying the requirements of the doctrine to a particular broadcast service, is a matter of some importance. This Court does not decide abstract issues of law, however; it reviews judgments in particular cases. And we think it clear that, in view of the circumstances surrounding this case, review by this Court of the judgment below is not warranted.

First, petitioners' greatly exaggerated claims regarding the practical effect of the decision below (see Pet. 9-11) cannot obscure the fact that the Commission's decision is in fact quite narrow, applying only to teletext, a broadcast service that is still in its infancy and that has an uncertain future. The Commission did *not* take any action to exempt conventional broadcast activities from the requirements of the fairness doctrine; indeed, the Commission expressly reaffirmed its intention to enforce those requirements unless they are eliminated pursuant to further action by the Commission or some other competent authority. The

---

Commission had held that the "equal opportunities" requirement imposed by Section 315 of the Act did not apply to teletext transmissions (Pet. App. 25a-31a).

Judge MacKinnon dissented with respect to both the Section 312(a)(7) and fairness doctrine issues (Pet. App. 38a). The full court of appeals denied a suggestion for rehearing en banc (*id.* at 138a). Two judges dissented from the denial of rehearing en banc on the ground that the panel had erred by upholding the Commission's determination that it had the authority to decline to extend the fairness doctrine to teletext services (*id.* at 139a-143a). Three judges stated that they had voted to grant the suggestion for rehearing en banc because the fairness doctrine issue was important, but expressed no view regarding the correctness of the panel determination (*id.* at 144a).

limited practical effect of the Commission's ruling is a factor weighing strongly against review by this Court.

Second, Congress—in response to the Commission's action in this and related proceedings—is at the present time actively considering legislation concerning the status of the fairness doctrine. That legislation would resolve the precise legal issue presented in this case by enacting into law the requirements of the fairness doctrine. In view of the pendency of the matter before Congress, this Court should stay its hand at this time. If the issue presented here is not resolved by Congress, the Court will be able to consider the matter in the event it arises in connection with future regulatory proceedings.

1. The Commission has recognized that there is no easy answer to the question whether Congress has enacted the fairness doctrine as positive law or simply approved the doctrine as a permissible exercise of the Commission's authority to regulate broadcasters in the public interest. See *Fairness Doctrine Report,* 102 F.C.C.2d 143, 227-246 (1985), petition for review pending *sub nom. Radio-Television News Directors Ass'n* v. *FCC,* No. 85-1691 (D.C. Cir. filed Oct. 22, 1985). After a careful review of the matter, both the Commission and the court of appeals concluded in this case that Congress has not eliminated the Commission's authority to shape the fairness doctrine to fit both the changing characteristics of the broadcast industry and the Commission's evolving view of the public interest. We submit that their conclusion is correct. Indeed, the only other court of appeals that has considered the question has reached the same result. *Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1066-1067 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976).[6]

---

[6] Petitioners' assertion (Pet. 12) that the Court should consider summary reversal in this case is wholly inappropriate in view of the absence of settled authority governing the question presented in the petition. Indeed, petitioners' claim (Pet. 13) that the Court's decision

Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a), states that a licensee who permits a candidate for public office to use a broadcasting station must "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Section 315(a) was amended by Congress in 1959 to provide that this "equal opportunities" requirement is not triggered by appearances by a candidate on a bona fide newscast, news interview, news documentary, or on-the-spot coverage of news events. The 1959 amendment went on to state (*ibid.*):

> Nothing in the [portion of the statute creating the exemption for news coverage] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

This Court repeatedly has recognized that Congress granted the FCC broad discretion to determine the contours of "the public interest" in the context of the broadcast industry. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 379-380 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). As Judge Bork recognized, "[i]t would have been extraordinary if Congress in 1959 had intended to strip the Commission of all further discretion in this area and to freeze by statute

---

in *Red Lion Broadcasting Co.* v *FCC*, 395 U.S. 367 (1969), controls this case is somewhat surprising in view of the statements in the Court's opinion that support the decision of the court below (see page 12, *infra*).

the fairness doctrine in the form it had in 1959. * * * One would have expected extended congressional discussion of the wisdom of such a move. There is none" (Pet. App. 151a).

The structure and language of the 1959 amendment is wholly inconsistent with the notion that Congress imposed upon broadcasters a separate, statutory obligation to comply with the fairness doctrine. The language of the amendment relating to the fairness doctrine does not in terms announce such a requirement. And the fact that this language appears in a disclaimer to the newly-established exemption from the "equal opportunities" requirement strongly supports the conclusion that it was designed simply "to make it clear that the statutory amendment [creating the exemption] does not affect the fairness doctrine obligation as the Commission had previously applied it" (Pet. App. 34a).

Moreover, the portion of the provision discussing broadcasters' fairness "obligation" does not describe that obligation in affirmative terms, but instead characterizes it as an "obligation imposed upon [broadcasters] under th[e] Act." The provision thus indicates that some *other* source of law, such as the Commission's rules and decisions, is the source of the fairness obligation. See Pet. App. 146a (statement of Bork, J., on denial of rehearing en banc). The statutory language accordingly provides ample basis for the court of appeals' conclusion that "Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act." *Id.* at 35a; see also *Public Interest Research Group* v. *FCC*, 522 F.2d at 1066.[7]

---

[7] Petitioners' sole argument in support of their contrary interpretation of the language of the statute (Pet. 13) is that, because the statute refers to both the obligation to operate in the public interest and the fairness doctrine as obligations imposed "under this Act," the statute

The legislative history of the 1959 amendment provides little support for petitioners' contrary interpretation of the statute. The purpose of the amendment was to overturn the Commission's decision in *Lar Daly*, 26 F.C.C. 715 (1959), which held that the equal opportunities requirement of Section 315 was triggered by the appearance of a political candidate on a newscast. The Commission has observed that "the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there do exist scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine." *Fairness Doctrine Report*, 102 F.C.C.2d at 235; see generally *id.* at 234-240.[8]

---

must mean that the fairness doctrine, like the public interest standard, is embodied in the Communications Act itself. But Congress could just as reasonably have used the term "under" to refer to the *statutory* obligation to operate in the public interest and the *administrative* decisions embodying the fairness doctrine: both obligations are imposed "under" the statute although they flow from different sources. See also Pet. App. 35a. Petitioners do not even attempt to explain why Congress would have used this quite obscure language—tucked into a disclaimer designed principally to avoid any unintended legislative alteration of existing rules—to impose a significant limitation upon the Commission's discretion to determine the public interest. See *id.* at 145a, 150a-151a.

[8] One fact that is clear from the legislative history is that the committee reports relied upon by petitioners (Pet. 15) do not support petitioners' interpretation of the statute. First, the language relating to the fairness doctrine was added to the bill on the Senate floor; it was not present in the bill reported by either committee. The committee reports therefore are of little utility in interpreting that language. Second, the Senate committee report specifically states that "[i]n recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law

This Court discussed the legislative history of the 1959 amendment in its decision in *Red Lion Broadcasting Co.* v. *FCC, supra.* The questions before the Court in *Red Lion* were whether certain aspects of the fairness doctrine had been authorized by Congress and, if so, whether those provisions violated the First Amendment. The Court was not required to determine whether Congress in 1959 had enacted the fairness doctrine as positive law or simply recognized the Commission's authority to adopt the doctrine. In discussing the evolution of the portion of the 1959 amendment relating to the fairness doctrine, however, the Court described the original language in the Senate bill as "a positive statement of doctrine," and went on to state that the amendment "was altered to *the present merely approving language* in the conference committee" (395 U.S. at 383-384 (footnote omitted; emphasis added)). This statement indicates that the Court in *Red Lion* did not view the amendment as a statutory codification of the fairness doctrine. See also *id.* at 382 (stating that in the 1959 legislation Congress "expressly accepted" the FCC's construction of the public interest standard and that "the *public interest language* of the Act authorized the Commisson" to adopt the fairness doctrine) (emphasis added); Pet. App. 146a-149a (statement of Bork, J., on denial of suggestion for rehearing en banc) (discussing this Court's decision in *Red Lion*).

In sum, the language of the statute and the legislative history, as interpreted by this Court in *Red Lion,* indicate that Congress has not codified the fairness doctrine as positive law, and that the Commission retains its discretion to determine whether, in a given situation, application of the fairness doctrine comports with the public interest.

---

which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy" (S. Rep. 562, 86th Cong., 1st Sess. 13 (1959)). The report therefore cuts against petitioners' interpretation of the statute.

2. Petitioners' extravagant assertions regarding the importance of the decision below (see Pet. 9-12) ignore the fact that the Commission's decision in this case is quite narrow. The Commission reaffirmed its intention "to pursue continued enforcement of these content-related broadcast laws, policies and rules until and unless they are altered by [the Commission] or by other competent authority" (Pet. App. 116a). All that the Commission decided here is that the fairness doctrine should not be *extended* to apply to a new service—teletext. And the limited effect of that determination is clear from the Commission's repeated recognition of the fact that teletext is a service that is still in its infancy. See Pet. App. 63a, 70a, 117a ("to date this service has not yet gone beyond the early experimental stage and * * * many of those who have made experimental offering of this service have not yet found a mix of offerings that appears clearly destined to find widespread consumer acceptance"). Because the effect of the Commission's decision here is quite limited, review by this Court is not warranted.[9]

Moreover, the Commission's determination that the fairness doctrine does not apply to teletext services does not leave licensees free to ignore issues of public importance. The Commission has made clear that all broadcast licensees have an obligation to present issue oriented or informational programming. See, *e.g., Radio Deregulation,* 84 F.C.C.2d 968, 982-983, on reconsideration, 87 F.C.C.2d 797 (1981), aff'd in relevant part *sub nom. Office of Communication* v. *FCC,* 707 F.2d 1413 (D.C. Cir.

---

[9] As we discuss below (see pages 14-15), several pending judicial and administrative proceedings present questions regarding the continued application of the fairness doctrine to conventional broadcast services. In the event the Commission decides that the application of the doctrine in that context is no longer in the public interest, this Court would likely have an opportunity—on judicial review of those proceedings—to consider the legal issue presented in this case.

1983); *Commercial TV Stations,* 98 F.C.C.2d 1076, 1091-1092 (1984), petition for review pending, *Action for Children's Television* v. *FCC,* No. 86-1425 (D.C. Cir. filed July 25, 1986).

3. Finally, ongoing regulatory and legislative activity regarding the fairness doctrine makes it appropriate for the Court to stay its hand at this time. The Commission recently undertook a study of the fairness doctrine. It concluded that the doctrine is constitutionally "suspect" and that the doctrine disserves the public interest because "[i]nstead of furthering the discussion of public issues, [it] * * * inhibits broadcasters from presenting controversial issues of public importance" (*Fairness Doctrine Report,* 102 F.C.C.2d at 156, 187, 225). The Commission declined to take any action on the basis of this conclusion, explaining that, because of strong congressional interest in the matter, "it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding" (*id.* at 148). That determination is now pending on judicial review. See *Radio-Television News Directors Ass'n* v. *FCC,* No. 85-1691 (D.C. Cir. filed Oct. 22, 1985).

In addition, in *Meredith Corp.* v. *FCC,* 809 F.2d 863 (D.C. Cir. 1987), a case in which the FCC found a violation of the fairness doctrine, the court of appeals remanded the matter to the Commission with directions to consider the broadcaster's constitutional challenges to the enforcement of the doctrine unless the Commission concludes that "in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest" (809 F.2d at 874). Pursuant to that remand, the Commission has solicited public comment on whether continued enforcement of the fairness doctrine is

both permissible under the First Amendment and consistent with the public interest. See Syracuse Peace Council, 52 Fed. Reg. 2805 (1987).

Finally, Congress is actively considering legislation that would resolve the question presented in this case by amending the Communications Act to codify the fairness doctrine as it existed on January 1, 1987. The Senate adopted this legislation on April 21, 1987. See 133 Cong. Rec. S5218-S5232 (daily ed. Apr. 21, 1987). A companion bill already has been the subject of hearings in the House of Representatives. See H.R. 1934, 100th Cong., 1st Sess. (Apr. 2, 1987). Action by the House is expected during this session of Congress. See 133 Cong. Rec. D634 (daily ed. May 7, 1987) (noting that the bill was reported to the House Committee on Energy and Commerce by its Subcommittee on Telecommunications and Finance). If the statute is enacted into law, it will, of course, resolve the issue of statutory interpretation presented in this case.

In view of this ongoing legislative activity, the absence of a conflict among the courts of appeals, and the narrowness of the decision below, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DIANE S. KILLORY
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel
Federal Communications Commission

MAY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40342